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February 7, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Communications

Dear Secretary Caton:

On February 6 and 7, 1997, representing the American Public Power Association, I had two telephone conversations about the statutory terms "telecommunications carrier" and "telecommunications service" with Lawrence J. Spiwak, a senior attorney in the Competition Division of the Office of General Counsel.

Today, I forwarded APPA's comments on these terms (two copies enclosed) to Mr. Spiwak.

Sincerely,

James Baller

Enclosures

No. of Copies rec'd 0+1
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February 7, 1997

Lawrence J. Spiwak
Senior Attorney
Competition Division
Office of General Counsel
Federal Communications Commission
Room 650H
1919 M Street, N.W.
Washington, D.C. 20554

Re: *Definitions of "Telecommunications Carrier" and "Telecommunications Service"*

Dear Mr. Spiwak:

Enclosed are the American Public Power Association's comments in the Commission's proceeding on local competition, including APPA's comments in support of its request for clarification or reconsideration of the Commission's discussion in its Interconnection Order of the the statutory terms "telecommunications carrier" and "telecommunications service."

I look forward to hearing from you.

Sincerely,

James Baller

James Baller

Enclosures

cc: Todd Tuten, American Public Power Association

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions of the	)	
Telecommunications Act of 1996	)	

To the Commission:

COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission (the Commission), the American Public Power Association (APPA) files these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM) to implement the local competition provisions of the Telecommunication Act of 1996 (the Act). APPA is the national service organization for approximately 2000 consumer-owned electric utilities throughout the Nation, located in every state except Hawaii.

For more than a century, consumer-owned electric utilities have played a vital role in furnishing essential local competition in the electric power industry. They are now well situated to play a similar role in the emerging field of telecommunications. As discussed below, the Telecommunications Act contains a comprehensive and integrated suite of definitions and requirements that reflects Congress's intent to remove barriers to entry and stimulate involvement by consumer-owned electric utilities in the rapid development of our National Information Infrastructure (NII). APPA submits that the Commission should resolve all questions of interpretation in this and other rulemaking proceedings to implement the Act in ways that would encourage consumer-owned electric utilities to become fully engaged in providing

telecommunications services themselves or in facilitating the provision of such services by others. At a minimum, the Commission should do nothing that would discourage such involvement.

Background

Consumer-owned electric utilities emerged in the 1880's in numerous small communities that were literally left in the dark by profit-driven privately-owned electric utilities. By 1890, more than 150 towns were operating lighting and power systems, and in the next decade, that number multiplied at a rapid rate. Because consumer-owned power systems typically charged prices that were half the rates charged by private utilities, "common people gained access to the miracle of electric lights, while in other cities only the wealthy could afford to switch from traditional gas or kerosene lamps."[1]

Consumer-owned power systems also filled gaps left by privately-owned utilities and brought competition into many larger cities. For example, despite stiff resistance from the competing private utility, the City of Detroit established a municipally-owned power system that reduced prices by fifty percent within seven years and extended service to the stores and homes of common people. Similar experiences elsewhere caused the popularity of consumer-owned power to soar. By 1923, the number of consumer-owned electric utilities peaked at more than 3000.[2]

Privately-owned electric utilities reached the zenith of their power in the late 1920's, following successive stages of overbuilding, shakeouts and consolidations similar to those which are widely expected to occur in the telecommunications industry over the next few years. By then, 16 holding companies had amassed control of 85 percent of the Nation's electric service. The privately-owned electric utilities seemingly had every advantage over their consumer-owned counterparts -- a

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1 R. Rudolph and S. Ripley, Power Struggle: The Hundred Year War Over Electricity at 10 (1986) (hereafter "Power Struggle").

2 Power Struggle at 47.

vertically and horizontally integrated industry, freedom to operate economically on a regional scale, ineffective regulation by government agencies, vast financial support from Wall Street, and dominance of public relations. Not surprisingly, consumer-owned power suffered, declining to 2,320 systems by 1928. Still, enough consumer-owned power systems remained to raise "troubling questions about fair rates, democratic control, and public service that would be widely debated again in the 1930's."[3]

In the presidential election campaign of 1932, electric power became the dominant issue. On one side, President Hoover argued that "[t]he majority of men who dominate and control electric utilities belong to a new school of public understanding as to the responsibilities of big business to the people."[4] On the other side, Franklin D. Roosevelt maintained that:

> [W]here a community, or a city, or a county, or a district, is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government . . . to set up . . . its own governmentally owned and operated service . . . the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility a "birch rod in the cupboard, to be taken out and used only when the child gets beyond the point where more scolding does any good."[5]

Over the last six decades, consumer-owned electric utilities have repeatedly proven that President Roosevelt's "yardstick" and "birchrod" concepts work well in practice. As a result, consumer-owned power systems now provide electricity to approximately 35 million Americans.

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5 President Roosevelt's speech, delivered in Portland, Oregon in September 1932, is quoted in R. Morgan, T. Riesenberg and M. Troutman, Taking Charge: A New Look at Power at 9 (1976).

Three-quarters of the consumer-owned power systems are located in towns with populations of less than 10,000, but some of the Nation's largest cities also operate electric utilities, including Los Angeles, Sacramento, Phoenix, Seattle, San Antonio, Austin, Memphis, Nashville, Jacksonville and Orlando.

The "yardstick" and "birchrod" concepts should also work well in the field of telecommunications, into which many consumer-owned electric utilities have evolved, or are likely to evolve, over the next few years.

Electric utilities require "real-time" communications capabilities to meet their information and system command-and-control needs. As a result, many utilities have constructed, or are considering constructing, sophisticated communications networks that include virtually all of the media that will be incorporated into the NII -- fiber optic cable, coaxial cable, twisted-pair copper wire, microwave, trunked land/mobile radio systems and power-line carriers.

The demands of consumer-owned electric utilities for enhanced telecommunication and information services are expected to rise as the utilities seek to operate with ever greater efficiency in order to survive in the new era of restructuring and deregulation of the electric power industry. The need to implement mandated energy conservation and environmental protection programs will reinforce these trends. Computers and microprocessors will play an increasingly important role in improving distribution efficiency and in enhancing the control, reliability and responsiveness of electrical service to the public. Advanced distribution devices will replace mechanical devices that control power flow on distribution systems, and new technology will make real-time pricing a reality in the near future. In short, sophisticated communication networks will be essential for utilities to ensure reliable service and to thrive in the next century.

Faced with the need to upgrade their telecommunications infrastructure primarily for the purposes of their own core business, consumer-owned electric utilities can help accelerate the pace of deployment of telecommunications services in their communities. That is so because the telecommunications facilities needed by utilities for load management and control operations can readily carry telephone conversations, cable television entertainment, data, and other interactive communications, including Internet services.

Consumer-owned electric utilities have four main options for using their enhanced telecommunications infrastructure. First, they can use it exclusively for their own needs. While that may not be the most desirable option, it is one that many consumer-owned electric utilities would elect if they came to believe that any benefits that they would realize by allowing their telecommunications facilities to be used for external purposes would be outweighed by the resulting burdens imposed by the Commission or the States.

Second, the option that many consumer-owned electric utilities may adopt if not discouraged from doing so by onerous regulatory burdens is to lease "dark fiber" (i.e., fiber optic cable without transmission equipment or services) to telephone companies, cable operators or other carriers of telecommunications services. This option would benefit all concerned, as it would offset a portion of the utilities' capital costs, make telecommunications infrastructure available to carriers at less than it would cost them to construct comparable facilities themselves, increase the number of potential competitors, reduce burdens on the environment, and lower prices to consumers.

Third, consumer-owned electric utilities can enter into creative partnerships with some of their customers or other entities under which they would furnish telecommunications services or support on an individual, private-carriage basis. As businesses across the Nation consider downsizing or relocating, such arrangements can be critical to the economic well-being of many communities.

Fourth, consumer-owned electric utilities can become full-fledged providers of telecommunications services to the public, competing head-to-head with telephone companies, cable operators, transmitters of data, and other suppliers of telecommunications services. More than 60 communities that have consumer-owned electric utilities are already providing cable television services, and consumer-owned utilities such as Glasgow, Kentucky, Cedar Falls, Iowa, and Lusk, Wyoming, are well on their way to becoming full-service "communications utilities."

In summary, in the absence of barriers imposed by the Commission or the States, consumer-owned electric utilities can become significant contributors to the development of the NII. They have access to the necessary poles, attachments and rights-of-way. Their investments in additional infrastructure will be driven by their core-business considerations of reliability and public safety. They have well-established, positive relationships with their customers. They have long histories as successful competitors. They also have a century-old ethic and tradition of universal service.

COMMENTS

The Commission Should Resolve All Questions of Interpretation of the Telecommunications Act In Favor of Encouraging Consumer-Owned Electric Utilities to Participate In Developing the National Information Infrastructure

Throughout the NPRM, the Commission observes that various provisions of the Telecommunications Act are interrelated and should be considered together because they may have implications that go beyond the specific issues to which they are primarily addressed. For example, in paragraph 13 of the NPRM, the Commission notes that the local competition requirements of Sections 251 and 252 of the Act emphasize the obligations of local exchange carriers (LECs) but also create "general duties for all local telecommunications carriers, and obligations for all local exchange carriers, whether classified as 'incumbent' LECs or not." In paragraph 24, the Commission states that its rules implementing Section 251 "will have a pervasive and substantial impact in a variety of

contexts under the 1996 Act and will serve as the cornerstone of the pro-competitive provisions of the statute. These rules will assist incumbent LECs, telecommunications carriers, state commissions, the FCC, and the courts in defining rights and responsibilities regarding interconnection, unbundling, resale, and many other issues under the 1996 Act." In paragraph 22, the Commission states that "the Section 251 rules should help give content and meaning to what state and local requirements the Commission 'shall preempt' as barriers to entry pursuant to Section 253." Similarly, in paragraph 254, the Commission states that the requirements of Section 254 pertaining to poles, ducts, conduits and rights-of-way should be considered in the context of this rulemaking because they are "vital to the development of local competition, because [they ensure] that competitive providers can obtain access to facilities necessary to offer services."

APPA agrees with the Commission's point that the Act should be read as a whole rather than as a collection of separate parts. APPA will therefore set forth below an integrated analysis of how the key provisions of the Act apply to consumer-owned electric utilities. In doing so, APPA will interpret to the Act as the Commission has interpreted it "in this and other proceedings, . . . in terms of removing statutory and regulatory barriers and economic impediments, in permitting efficient competition to occur wherever possible, and replicating competitive outcomes where competition is infeasible or not yet in place." In particular, APPA will attempt to harmonize its comments with the Commission's belief that the Act's basic entry policy is "competitively neutral" and "pro-competition, not pro-competitor." NPRM ¶ 12.

1. "Telecommunications Carriers" and "Telecommunications Services"

In paragraph 245-246 of the NPRM, the Commission seeks comments on the meaning of the term "telecommunications carrier." APPA submits that, as applied to consumer-owned electric utilities, the meaning of this term is clear from the face of the Act and its legislative history.

Under Section 3(49) of the Act, the term "telecommunications carrier" means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." Section 3(51), in turn, defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." The key operative terms are "for a fee" and "directly to the public." APPA submits that, by using these terms at the urging of utilities, Congress reflected its intent to exclude at least the following categories of services from the Act: a utility's own internal usage of its telecommunications facilities; a utility's provision of telecommunications support to other instrumentalities of government; and a utility's provision of telecommunications infrastructure -- such as "dark fiber" or wholesale capacity -- to persons who are themselves in the business of furnishing telecommunications services for a fee directly to the public.[6]

The Act's alternative definition of "telecommunications service" -- i.e., "the offering of telecommunications for a fee . . . to such classes of users as to be effectively available directly to the public, regardless of the facilities used" -- is inherently fact-specific. At one end of the spectrum, this definition would arguably cover a utility's sales of telecommunications services through resellers who merely act as go-betweens with the public. At the other end, the definition should not be read to cover sales to a restricted class of end users pursuant to contracts for private carriage (as

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[6] As UTC notes in both this proceeding and in the Commission's proceeding on universal service, the legislative history of the nearly identical definition of "telecommunications service" in S.1822 in the prior Congress indicates that Congress did not intended the Act to apply to "the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services." S. Rep. No. 103-367, 103d Cong., 2d Sess. (September 14, 1994). In fact, Congress expressly stated that "[t]he offering by an electric utility of bulk fiber optic capacity (i.e., 'dark fiber') does not fall within the definition of telecommunications service." *Id.*

distinguished from common carriage). APPA submits that the Commission should interpret the term "effectively available" narrowly in order to give consumer-owned electric utilities maximum encouragement to enter into creative relationships with selected customers or other entities in their communities. As indicated above, the economic well-being of many communities may turn on the success of such relationships.

Furthermore, as the Commission also observed in paragraph 26 of the NPRM, Congress intended that the Commission be "proactive" in implementing the "pro-competitive, de-regulatory, national policy framework envisioned by the 1996 Act." One way that the Commission can do this is to declare that, in the interest of promoting competition, it will impose minimal constraints on consumer-owned electric utilities, even where such entities may arguably be covered by the definitions of "telecommunications carriers." For example, the Commission should make clear that it understands Section 3(44) to mean that a consumer-owned electric utility that elects to furnish "telecommunications services" will be subject to the requirements of the Act "only to the extent that it is providing telecommunications services." The Commission should also declare that it will freely grant petitions for forbearance of regulation submitted by consumer-owned electric utilities pursuant to Section 401 of the Act, because the Commission has determined that the provision of "telecommunications services" by such entities would "be consistent with the public interest," would "promote competitive market conditions" and would "enhance competition among providers of telecommunications services."

2. Preemption of State and Local Authority

In paragraph 22 of the NPRM, the Commission states that "Section 253 bars state and local regulations that prohibit or have the effect of prohibiting entities from offering telecommunications services. It also authorizes the Commission to preempt any law or regulation that is violative of this

section. The section 251 rules should help to give content and meaning to what state or local requirements the Commission 'shall preempt' as barriers to entry pursuant to section 253." APPA submits that the reverse is also true -- the congressional intent reflected in Section 253 should also give content and meaning to the rules that the Commission adopts under Section 251.

Specifically, APPA submits that Section 253 constitutes a clear expression of Congress's intent that electric utilities, including consumer-owned electric utilities, be encouraged to participate either directly or indirectly in the development of the NII. Thus, Section 253(a) applies to "any entity" that wishes to provide telecommunications services, and the legislative history of that section, without distinguishing among different kinds of utilities, explicitly mentions utilities as being among the potential beneficiaries of preemption under Section 253. S. Rep. No. 104-230, 104th Cong.,2d Sess. (February 1, 1996).

Furthermore, on its face, Section 253 suggests that Congress intended that the Commission be vigorous in striking down state and local efforts to preclude entry of utilities into the field of telecommunications. Thus, the Commission must not only preempt state and local measures that would *explicitly* prohibit any entity from providing telecommunications services, but it must also preempt any measure that could even "have the effect" of prohibiting such services.

In sum, APPA urges the Commission to read Section 253, not merely as a provision pertaining to preemption, but as yet another manifestation of Congress's clear intent to promote competition in telecommunications by electric utilities. That theme is pervasive in the Act and should therefore also be pervasive in the Commission's rules.

3. Poles, Attachments and Rights-of-Way

In paragraphs 220-225 of the NPRM, the Commission turns to the Act's requirement that LECs provide access to poles, ducts, conduits, and rights of way at just and reasonable rates, terms

and conditions. The Commission indicates that it intends to adopt rules to implement Section 703 of the Act, the main section addressing poles, attachments and rights-of-way, in one or more separate rulemaking proceedings, but it requests comments on certain limited issues posed by the new Sections 224(f) and (h) of the Communications Act of 1934. These comments are due on May 20, 1996.

APPA assumes that it will have an opportunity to state its views on the effects of Section 703 on consumer-owned electric utilities when the Commission initiates its proceeding to implement that section of the Act. However, having promised the Commission an integrated analysis of the way in which the key provisions of the Act apply to consumer-owned electric utilities, APPA believes it may be useful to address the threshold issue of coverage by Section 703 here, at least preliminarily.

In Section 703(1), the Act amends the definition of a "utility" in Section 224(a)(1) of the 1934 Act to include "a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." In Section 703(7), the Act imposes upon all firms meeting the new definition of "utility" an obligation to "provide a cable television system or any telecommunications carriers with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." Elsewhere, Section 703 authorizes the Commission or the States to regulate the rates, terms and conditions for access to pole attachments, prescribes timetables for issuing regulations to implement Section 703, and specifies some of the key requirements that the Commission's regulations must contain.

From the standpoint of consumer-owned electric utilities, the key issue is that Section 703(1) left intact the limitation in Section 224(a)(1) of the 1934 Act that the term "utility" does not include "any railroad, any person who is cooperatively organized, or any person who is owned by the Federal Government or any State." Section 703(1) also did not alter Section 224(a)(3) of the 1934 Act,

which defines the term "State" as "any State, territory, or possession of the United States, the District of Columbia, *or any political subdivision, agency or instrumentality thereof* (emphasis added)." Section 703 thus preserved and reaffirmed the consumer-owned electric utilities' historical exemption from the Commission's requirements pertaining to poles, attachments and rights-of-way.

Conclusion

With appropriate incentives, consumer-owned electric utilities can play a important role in bringing competition to the emerging field of telecommunications. APPA submits that the Commission should do all that it can to encourage such involvement. At the very least, the Commission should do nothing to discourage consumer-owned electric utilities from participating in the development of the NII.

Respectfully submitted,

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Attorneys for the
American Public Power Association

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions of the	)	
Telecommunications Act of 1996	)	

To the Commission:

COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

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Attorneys for the
AMERICAN PUBLIC POWER ASSOCIATION

May 16, 1996

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
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telecommunications services themselves or in facilitating the provision of such services by others. At a minimum, the Commission should do nothing that would discourage such involvement.

Background

Consumer-owned electric utilities emerged in the 1880's in numerous small communities that were literally left in the dark by profit-driven privately-owned electric utilities. By 1890, more than 150 towns were operating lighting and power systems, and in the next decade, that number multiplied at a rapid rate. Because consumer-owned power systems typically charged prices that were half the rates charged by private utilities, "common people gained access to the miracle of electric lights, while in other cities only the wealthy could afford to switch from traditional gas or kerosene lamps."[1]

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In summary, in the absence of barriers imposed by the Commission or the States, consumer-owned electric utilities can become significant contributors to the development of the NII. They have access to the necessary poles, attachments and rights-of-way. Their investments in additional infrastructure will be driven by their core-business considerations of reliability and public safety. They have well-established, positive relationships with their customers. They have long histories as successful competitors. They also have a century-old ethic and tradition of universal service.

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Throughout the NPRM, the Commission observes that various provisions of the Telecommunications Act are interrelated and should be considered together because they may have implications that go beyond the specific issues to which they are primarily addressed. For example, in paragraph 13 of the NPRM, the Commission notes that the local competition requirements of Sections 251 and 252 of the Act emphasize the obligations of local exchange carriers (LECs) but also create "general duties for all local telecommunications carriers, and obligations for all local exchange carriers, whether classified as 'incumbent' LECs or not." In paragraph 24, the Commission states that its rules implementing Section 251 "will have a pervasive and substantial impact in a variety of

contexts under the 1996 Act and will serve as the cornerstone of the pro-competitive provisions of the statute. These rules will assist incumbent LECs, telecommunications carriers, state commissions, the FCC, and the courts in defining rights and responsibilities regarding interconnection, unbundling, resale, and many other issues under the 1996 Act." In paragraph 22, the Commission states that "the Section 251 rules should help give content and meaning to what state and local requirements the Commission 'shall preempt' as barriers to entry pursuant to Section 253." Similarly, in paragraph 254, the Commission states that the requirements of Section 254 pertaining to poles, ducts, conduits and rights-of-way should be considered in the context of this rulemaking because they are "vital to the development of local competition, because [they ensure] that competitive providers can obtain access to facilities necessary to offer services."

APPA agrees with the Commission's point that the Act should be read as a whole rather than as a collection of separate parts. APPA will therefore set forth below an integrated analysis of how the key provisions of the Act apply to consumer-owned electric utilities. In doing so, APPA will interpret to the Act as the Commission has interpreted it "in this and other proceedings, . . . in terms of removing statutory and regulatory barriers and economic impediments, in permitting efficient competition to occur wherever possible, and replicating competitive outcomes where competition is infeasible or not yet in place." In particular, APPA will attempt to harmonize its comments with the Commission's belief that the Act's basic entry policy is "competitively neutral" and "pro-competition, not pro-competitor." NPRM ¶ 12.

1. "Telecommunications Carriers" and "Telecommunications Services"

In paragraph 245-246 of the NPRM, the Commission seeks comments on the meaning of the term "telecommunications carrier." APPA submits that, as applied to consumer-owned electric utilities, the meaning of this term is clear from the face of the Act and its legislative history.

Under Section 3(49) of the Act, the term "telecommunications carrier" means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." Section 3(51), in turn, defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." The key operative terms are "for a fee" and "directly to the public." APPA submits that, by using these terms at the urging of utilities, Congress reflected its intent to exclude at least the following categories of services from the Act: a utility's own internal usage of its telecommunications facilities; a utility's provision of telecommunications support to other instrumentalities of government; and a utility's provision of telecommunications infrastructure -- such as "dark fiber" or wholesale capacity -- to persons who are themselves in the business of furnishing telecommunications services for a fee directly to the public.[6]

The Act's alternative definition of "telecommunications service" -- i.e., "the offering of telecommunications for a fee . . . to such classes of users as to be effectively available directly to the public, regardless of the facilities used" -- is inherently fact-specific. At one end of the spectrum, this definition would arguably cover a utility's sales of telecommunications services through resellers who merely act as go-betweens with the public. At the other end, the definition should not be read to cover sales to a restricted class of end users pursuant to contracts for private carriage (as

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[6] As UTC notes in both this proceeding and in the Commission's proceeding on universal service, the legislative history of the nearly identical definition of "telecommunications service" in S.1822 in the prior Congress indicates that Congress did not intended the Act to apply to "the offering of telecommunications facilities for lease or resale by others for the provision of telecommunications services." S. Rep. No. 103-367, 103d Cong., 2d Sess. (September 14, 1994). In fact, Congress expressly stated that "[t]he offering by an electric utility of bulk fiber optic capacity (i.e., 'dark fiber') does not fall within the definition of telecommunications service." *Id.*

distinguished from common carriage). APPA submits that the Commission should interpret the term "effectively available" narrowly in order to give consumer-owned electric utilities maximum encouragement to enter into creative relationships with selected customers or other entities in their communities. As indicated above, the economic well-being of many communities may turn on the success of such relationships.

Furthermore, as the Commission also observed in paragraph 26 of the NPRM, Congress intended that the Commission be "proactive" in implementing the "pro-competitive, de-regulatory, national policy framework envisioned by the 1996 Act." One way that the Commission can do this is to declare that, in the interest of promoting competition, it will impose minimal constraints on consumer-owned electric utilities, even where such entities may arguably be covered by the definitions of "telecommunications carriers." For example, the Commission should make clear that it understands Section 3(44) to mean that a consumer-owned electric utility that elects to furnish "telecommunications services" will be subject to the requirements of the Act "only to the extent that it is providing telecommunications services." The Commission should also declare that it will freely grant petitions for forbearance of regulation submitted by consumer-owned electric utilities pursuant to Section 401 of the Act, because the Commission has determined that the provision of "telecommunications services" by such entities would "be consistent with the public interest," would "promote competitive market conditions" and would "enhance competition among providers of telecommunications services."

2. Preemption of State and Local Authority

In paragraph 22 of the NPRM, the Commission states that "Section 253 bars state and local regulations that prohibit or have the effect of prohibiting entities from offering telecommunications services. It also authorizes the Commission to preempt any law or regulation that is violative of this

section. The section 251 rules should help to give content and meaning to what state or local requirements the Commission 'shall preempt' as barriers to entry pursuant to section 253." APPA submits that the reverse is also true -- the congressional intent reflected in Section 253 should also give content and meaning to the rules that the Commission adopts under Section 251.

Specifically, APPA submits that Section 253 constitutes a clear expression of Congress's intent that electric utilities, including consumer-owned electric utilities, be encouraged to participate either directly or indirectly in the development of the NII. Thus, Section 253(a) applies to "any entity" that wishes to provide telecommunications services, and the legislative history of that section, without distinguishing among different kinds of utilities, explicitly mentions utilities as being among the potential beneficiaries of preemption under Section 253. S. Rep. No. 104-230, 104th Cong.,2d Sess. (February 1, 1996).

Furthermore, on its face, Section 253 suggests that Congress intended that the Commission be vigorous in striking down state and local efforts to preclude entry of utilities into the field of telecommunications. Thus, the Commission must not only preempt state and local measures that would *explicitly* prohibit any entity from providing telecommunications services, but it must also preempt any measure that could even "have the effect" of prohibiting such services.

In sum, APPA urges the Commission to read Section 253, not merely as a provision pertaining to preemption, but as yet another manifestation of Congress's clear intent to promote competition in telecommunications by electric utilities. That theme is pervasive in the Act and should therefore also be pervasive in the Commission's rules.

3. Poles, Attachments and Rights-of-Way

In paragraphs 220-225 of the NPRM, the Commission turns to the Act's requirement that LECs provide access to poles, ducts, conduits, and rights of way at just and reasonable rates, terms